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SUBJECT: ICTY: MILOSEVIC TRIAL CHAMBER BALANCES KEY
WITNESSES, HEALTH ISSUES AND EFFICIENT TRIAL MANAGEMENT

REF: A. THE HAGUE 2568
B. SECSTATE 287657

Classified By: Acting Legal Counselor David Kaye per reasons 1.5 (b)-(d)
(b).

¶11. (SBU) Summary: Trial Chamber III of the International Criminal Tribunal for the Former Yugoslavia (ICTY) had its hands full this week as it reconvened to hear the Prosecution's case against Slobodan Milosevic. Compressed into the new three-day per week schedule, the proceedings balanced the testimony of key witnesses, including General Rupert Smith, Commander of the UN Protection Force (UNPROFOR) in Bosnia and Herzegovina (BiH) in 1995; continued management of Milosevic's health and defense resources; and procedural mechanisms designed to handle the Prosecution case efficiently. End summary.

Key testimony

¶12. (SBU) On October 9, the trial chamber heard the testimony of General Rupert Smith, Commander of UNPROFOR in 1995 and Deputy Allied Supreme Commander Europe from 1998-2002. His testimony, among other things, placed Milosevic and Mladic at the same meeting on July 15, 1995 in Belgrade. He also testified that the shelling of the market place in Sarajevo in August 1995, which killed and wounded many civilians, must have come from Bosnian Serb positions and not from within the enclave. Smith handled well the cross-examination on this topic, in which Milosevic highlighted discrepancies between an initial French-led investigation and a later, more comprehensive one carried out by Smith's American-led team. He placed soldiers in "black uniforms" in the assault on Zepa, which occurred directly after the massacres in Srebrenica. The soldiers in black uniforms, Smith testified, were not part of the regular Bosnian Serb forces and wore Serbian Army flashes on their sleeves. They remained in Zepa until they left with Mladic to reinforce an area in West Republica Srpska. He also exposed coded communications which appeared to show that Milosevic was in contact with Mladic through the summer of 1995. Smith testified to his belief that Milosevic must have known of the ongoing Srebrenica atrocities as of the meeting with Mladic on July 15.

¶13. (C) On the same day of Smith's testimony, one senior prosecution attorney said that members of the Srebrenica team (i.e., those building the case for Milosevic's share of responsibility for the July 1995 massacres around Srebrenica) were "bouncing off the walls" because of lead prosecutor Geoffrey Nice's failure to elicit Smith's view that the fact of the massacres -- if not the scope -- was clearly foreseeable by anybody with knowledge of the situation in and around the so-called UN safe haven. Smith told the prosecution team on the eve of his testimony that he strongly believed this to be true, but, for an unknown reason, Nice failed to ask the relevant questions during the direct examination. Comment: This is especially dispiriting to the Srebrenica team, which is laboring strenuously to build the genocide case against Milosevic. End comment.

¶14. (SBU) Earlier in the week, the Prosecution called one insider witness who testified to Milosevic's contacts with key Bosnian Serb leaders and a witness who explained a report regarding statistical analysis of the change in demographics in the Balkans region. Through extensive surveys and analysis of voting records, the report showed how the compositions of different regions of the Balkans radically changed from mixed ethnic demographics to homogenous and separate ethnic populations throughout the duration of the war. The trends were consistent throughout the border regions.

The Health of the Accused

¶15. (C) Milosevic's health continues to be a pervasive presence in the proceedings. One Prosecution team member told Embassy legal officers that, during the morning break on

Tuesday, the first day back in trial after a two-week suspension, a spot-check showed that Milosevic's blood pressure had spiked to 160/110. After doctors concluded that Milosevic could nonetheless conclude the day's proceedings, the trial continued in session and Milosevic completed his cross-examination of the witness that day. The Accused, who looked fatigued on Tuesday, looked much better on Wednesday and Thursday in court.

¶6. (U) Bearing the health concerns in mind, the Trial Chamber, on October 6, ordered that the role of the Amici Curiae be extended to include receiving "communications as the Accused may make to them and to act in any way to protect and further the interests of his Defence." The Chamber issued the order in light of "the recurring medical condition of the Accused since 18 March 2002; and, the desirability of the Amici Curiae giving greater assistance to the Accused."

¶7. (C) Meanwhile, as the trial chamber implemented its new hearing schedule and the health issues remain a key concern for all parties to the trial, members of the Prosecution team are at a very preliminary phase of contemplating whether they could rest their case even before using up their remaining 43 trial days. While they assert that all of their remaining witnesses are critical, some prosecutors are concerned that the trial could be indefinitely postponed due to the accused's health, or even cut short by his death, leaving the Prosecution unable to present key evidence. One problem, a prosecutor said, was that a premature conclusion of the case would preclude the amici, for example, from filing the equivalent of a "summary judgment" motion under Rule 98 bis of the Tribunal Rules of Procedure and Evidence. Prosecution members believe that the trial chamber would respond to such a motion by ruling that the Prosecution had presented sufficient evidence "to sustain a conviction" (in the words of Rule 98 bis) on many, if not all, of the counts against Milosevic. But if Milosevic were to be incapacitated before the Prosecution rests its case, no Rule 98 bis motion would be presented to the chamber, and the trial could thus be left in limbo without even a modicum of finality.

Trial Efficiency

¶8. (SBU) Prior to the testimony of General Smith, the Trial Chamber heard arguments regarding the submission of Smith's written statement -- as opposed to actual direct examination -- as evidence-in-chief. Under last week's Appeals Chambers ruling (ref A), Rule 89(F) provides for the admission of written statements when in the "interest of justice." Milosevic argued vigorously, and fairly logically, against the submission of written evidence in this case. He referred to the "alleged evidence" in writing as "piles and piles" of paper that the prosecution wants to slip in instead of having oral testimony. The Accused argued that there was no possible way that he could review the documents submitted by the Prosecution. He stated that one could disclose to the court "the existence of the Congress Library" but that would not improve his ability to review every document that it contains. He also argued that while oral testimony can be heard by all in open session, the public has no access to these written statements.

¶9. (SBU) Lead Prosecutor Nice argued that the primary means of finding discrepancies in testimony occurs during the cross examination, not during the direct. Furthermore, Nice argued that because there is no jury, the professional judges of the Chamber can easily deal with written statements as evidence in lieu of oral testimony. Nice continued that it was in the interest of justice that as much evidence and material be presented to the court as possible. The Chamber ruled in this instance that the written statement would be admitted as evidence-in-chief; however, consistent with the Appeals Chamber's decision, any material going to the proof of the acts or conduct of the accused must be adduced orally in direct examination.

¶10. (C) Finally, in a recognition of the dwindling number of prosecution trial days, the Chamber also ordered the Prosecution to submit to the court a finalized witness list within 21 days. Relatedly, the Prosecution intended to file on Friday, October 10, its motion for protective measures for the testimony of General Clark (ref b). The Prosecution is considering whether the testimony of other USG witnesses -- including Richard Holbrooke -- should be sought.

¶11. (C) Comment: The week of proceedings was, in many respects, a continuation of recent themes. As it happened, Milosevic showed the ability to persevere through the trial after two weeks off for health reasons, a minor victory in itself. Moreover, he demonstrated a certain engagement in the proceedings -- for example, in his cross-examination of General Smith and his arguments against the introduction of Smith's statement in lieu of oral evidence. Still, the background noise of the trial -- the health concerns and the trial chamber's efforts to maintain a basic fairness to the

proceedings -- continues to engage the chambers as much as the prosecution's case itself. Until Milosevic's health is seen to be stabilizing, that pattern is likely to hold. End comment.

SOBEL